UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TIME WARNER CABLE NEW YORK CITY, LLC

and Case 02–CA–126860

LOCAL UNION NO. 3 INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS,
AFL–CIO

Allen M. Rose and Joseph Luhrs, Esqs., for the General Counsel.
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New York, New York, and *Kevin M. Smith, Esq.* (*Time Warner Cable),* of
New York, New York, for the Respondent.
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LLP), of Melville, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case arises out of union strike activity that occurred in front of Time Warner Cable New York City, LLC's (the Company) facility at Paidge Avenue in Brooklyn, New York, during the morning of April 2, 2014.[1] During its subsequent investigation, the Company questioned employees regarding their participation in the work stoppage and disciplined numerous employees. Most employees who were present received final warning letters. However, seven employees deemed to have engaged in the most serious misconduct received 2-week suspensions. Three were suspended because they engaged in active misconduct by constructing a vehicular blockade of company operations. The other four employees—Diana Cabrera, Azeam Ali, Ralf Anderson and Frank Tsavaris—were suspended because they were off duty at the time and had no legitimate reason to be at that location.

This case was tried in New York, New York, on April 11–13, 2016. Local Union No. 3 International Brotherhood of Electrical Workers AFL–CIO (the Union or Charging Party) filed and served the charge and amended charge on April 18 and August 19, 2014, respectively, and

[1] All dates are 2014 unless otherwise indicated.

the General Counsel issued the second amended complaint on March 31, 2016. The complaint alleges that the Company's questioning of employees following the strike constituted coercive interrogation in violation of Section 8(a)(1) of the National Labor Relations Act[2] and that its suspensions of Cabrera, Ali, Anderson, and Tsavaris unlawfully discriminated against them in violation of Section 8(a)(3) because they engaged in protected union activity initiated by the Union.

The Company alleges that the four discriminatees did not engage in protected conduct because (1) at the time of the events in question, their actions contravened the no-strike provision in a collective-bargaining agreement (CBA), and (2) they participated in mass picketing that interfered with ingress to and egress from the Company's facility.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a domestic limited liability company, is engaged in providing cable television, telephone and high speed internet services at its facility in Brooklyn, New York, where it annually derives gross revenues in excess of $100,000 and purchases and receives goods, supplies, and utilities valued in excess of $5000 directly from suppliers outside the State of New York. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

The Company operates six divisions in the New York City metropolitan area: Northern Manhattan, Southern Manhattan, Brooklyn, Queens and Staten Island, New York, and Bergen County, New Jersey (collectively referred to as the six facilities or divisions). The Southern Manhattan Division, headquartered in an expansive facility located on Paidge Avenue in Brooklyn (the facility), provides service (television, internet, security, and telephone) to all of the Company's residential and commercial customers in Manhattan south of 86th Street. It houses dispatch, communications, technical operations (installation, service, and repair), construction, and survey and design personnel and equipment. The facility encompasses executive offices, an indoor garage, outside parking areas, a staff of over 600 (including various kinds of technicians,

[2] 29 U.S.C. §§ 158(a)(1), et seq.

foremen, and managers) as well as a fleet of company vehicles. The facility is next door to a New York City Fire Department annex that houses large emergency vehicles.

B. The Collective-Bargaining Relationship With The Union

The Union has represented company employees at the six facilities for over 10 years. CBAs reached between the Company and Union in 2005 and 2009 were each accompanied by Riders specific to each facility and preceded by a comprehensive memorandum of agreement (MOU). The 2009 CBA expired on March 31, 2013. It contained, in pertinent part, a no-strike clause at section 31: "There shall be no cessation or stoppage of work, service or employment on the part of or the instance of either party, during the term of this agreement."

On January 3, 2013, prior to the commencement of bargaining over a successor CBA, a bargaining unit employee at one of the six locations filed a decertification petition with Region 22 seeking to decertify the Union as the collective-bargaining representative of employees at that facility. After a hearing, the Regional Director for Region 22 dismissed the petition on the ground that the most appropriate unit in the decertification context should have been a multi-location unit consisting of the six facilities. The Company did not contest that decision and subsequently agreed with the Union that all six facilities would be treated as one single bargaining unit.

C. Negotiations for a Successor Agreement

Thereafter, bargaining resumed and the parties executed an MOU on March 28, 2013 summarizing agreed-upon changes to the expiring CBA for all six facilities. The introduction stated that "the full text of the applicable changes will be incorporated in a new Collective Bargaining Agreement which shall become effective, upon ratification by the Union membership, scheduled for April 4, 2013."[3] The new CBAs were to be effective from April 1, 2009 to March 31, 2013. The employees at the six facilities ratified the MOUs in a single vote. There was no separate ratification vote, however, regarding the terms and conditions contained in the previous location specific Riders. The 2009–2013 Riders addressed standby procedures at all six facilities, but also included additional issues specific to four facilities: Staten Island facility—vacation, temporary employees and work performed by classification; Bergen facility—bargaining unit work, sick days, work schedules, journeyman and other designations; Northern Manhattan—double compensation for overtime work on weekends; Southern Manhattan—elimination of certain service and maintenance work, and dispatch department function.

Although the parties had not yet integrated the substance of the agreement embodied in the MOU into the standard CBA format covering employees at all six facilities, the Company implemented several changes contained in the MOU as of April 1, 2013. They included wages and increases in payments to the Union's annuity fund.

[3] The summary of changes included provisions addressing: the term of agreement; subcontracting and contracting out work; telephony deleted; workweeks, hours and shifts; overtime; holidays; annuity payments; social security contributions; education fund; wages rates and premium pay; journeymen rights; work performed by nonjourneymen; and payroll savings plan deleted.

On May 14, 2013, the Company provided the Union with a draft of a successor CBA. The draft incorporated the identical provisions of the expired CBA, along with the changes set forth in the MOU provisions the six locations. None of identical provisions, which included the no-strike clause, were discussed during negotiations. Missing, however, were the facility specific Riders that accompanied previous CBAs.

On July 8, 2013, the Union informed the Company that the draft omitted the Riders and language pertaining to bonuses for electrical engineering degrees. After an exchange of communications disagreeing over whether the parties agreed to include these provisions in the successor agreement, the parties met again on September 9, 2013. The Company continued to maintain that it would not agree to include the Riders in the successor agreement. On that basis, the Union refused the Company's demand that it execute the draft successor agreement. After further negotiations in February and March 2014, the Company proposed revised versions of several Riders in a new successor contract. Several communications followed regarding the Company's omission of the electrical engineers provision and the Southern Manhattan Rider.

On March 31, after concluding that the Union would not sign any of the proposed CBAs sent to it by the Company, the Company filed an unfair labor practice charge alleging, pursuant to *H. J. Heinz Co. v. NLRB,* 311 U.S. 514 (1941), that the Union failed to execute a written agreement embodying the MOA.[4]

In a decision and recommended order, issued April 28, 2015, and adopted by the Board on October 29, 2015, Judge Steven Fish concluded that the Union did not violate Section 8(b)(3) by refusing to execute the successor CBA. He based that decision on the insufficiency of evidence demonstrating that the parties reached a "meeting of the minds" on all substantive issues, or that the documents submitted by the Company to the Union for execution accurately incorporated any such agreement. *Electrical Workers IBEW* Local *3 (Time Warner Cable),* 363 NLRB No. 30, slip op. at 16 (2015).

In denying the Company's motion to reopen the record to admit posthearing evidence of grievances filed by the Union, which allegedly constituted admissions that the Union unlawfully refused to execute an agreed-upon contract, the Board noted:

> The Charging Party contends that this evidence demonstrates that the [Company] unlawfully refused to execute an agreed-upon contract. Contrary to the [Company's] contention, the [Union's] posthearing conduct shows only that the [Company] mistakenly believed that the parties had reached agreement on March 28, 2013. It does not bear on the relevant question of whether the parties reached a meeting of the minds regarding all material terms of their successor contract.

The Board provided further clarification as to why the Union did not violate Section 8(b)(3) of the Act by refusing to execute the successor CBA:

[4] The Union also filed an 8(a)(5) and (1) charge arising out of the same transaction but that charge was dismissed by the Region.

> [W]e find it unnecessary to pass on the judge's finding that the Charging Party's inclusion of the South Manhattan Rider in the copy of the contract it attached to its Federal district court complaint alleging a violation of the contractual no-strike clause constituted an admission that the Rider was part of the parties' agreement.

D. Foremen Are Disciplined

On April 1, 1 day after it filed unfair labor practices against the Union, the Company issued 2-day suspensions to several foremen, including Anderson and Tsavaris, for refusing a company directive requiring them to take tools home at the end of their shifts. The directive was the subject of the grievance process set forth in the expired CBA. In addition, Phil Papale, a shop steward, was suspended for conduct while representing a foreman during the grievance process.

Shortly after their suspensions, Anderson and Tsavaris informed Derek Jordan, their union representative. Anderson also informed Jordan that a shop steward was not present when he was issued the suspension.[5] Jordan and other union representatives responded by calling for bargaining unit members to attend a "safety meeting" outside the facility the next morning.[6]

E. The Union Disrupts Company Operations On April 2

On a typical day in 2014, between 6:30 and 8 a.m. approximately 150 field technicians drove their personal vehicles to work, parked on a lot adjacent to the Paidge Avenue facility, entered the facility to receive assignments from their foremen, and then drove designated company vehicles out of the facility to customer service locations. In addition to dispatching vehicles from the warehouse and repairing them there, the Company also receives shipments of equipment and supplies at the facility.

As depicted by the Company's closed-circuit security camera video, at about 6:23 a.m. on April 2, 2014, Jordan arrived in front of the facility for the purpose of initiating a work stoppage or strike. Although there were available parking spots along the curb, he parked his vehicle perpendicular to the direction of traffic in the middle of Paidge Avenue.[7] Shortly thereafter, Jordan directed several Company employees to move their vehicles from parking spots and position them in similar fashion, perpendicular to traffic, in the middle of the street.[8] Over the next 10 minutes, six more vehicles parked in the middle of Paidge Avenue. The result was that, by 6:33 a.m., vehicles could no longer access or exit from the facility, including the

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[5] GC Exh. 31, 33.

[6] Cabrera testified that the Union announced the "safety meeting" the previous day on social media. (Tr. 165.), while Tsavaris testified that he was notified about the meeting in an early morning call from his shop steward on April 2. (Tr. 189–190.) I found it peculiar that the 4 discriminatees would travel to Paidge Avenue on their day off for a safety meeting. Nevertheless, there is insufficient credible evidence to conclude that any of them knew beforehand that the Union planned a work stoppage.

[7] Jordan's denial that he precipitated a "job action" and merely convened a "safety meeting" in order "to get the workers to go back to work or to go to work," was not credible. Responding to the previous day's suspension of the foremen, he orchestrated a work stoppage by positioning vehicles in the middle of the street and instructing employees to gather there in order to impede company operations commencing with the 7 and 7:30 a.m. shifts. (Tr. 367–368, 370–371, 389–390).

[8] GC Exh. 20.

main entrance, garage entrance and employee parking lot.[9]

By 7 a.m., about 50 employees gathered in between the vehicles positioned in the middle of the street. As they congregated, union representatives handed them fliers regarding work safety and *Weingarten* rights to representation during disciplinary interviews.[10] At about 7:30 a.m. Jordan motioned employees to gather around him in the middle of the street. He then proceeded to address employee safety concerns relating to the absence of their suspended foreman, as well as their *Weingarten* rights. The gathering broke up at about 8 a.m. and Paidge Avenue was reopened to vehicular traffic.[11]

Gregg Cory, the Company's area vice president for Southern Manhattan, was apprised immediately about the vehicles parked in the middle of the street. Cory called the Company's security office, which in turn called the police department. Police officers responded shortly thereafter and spoke with Jordan. He assured them that the crowd would soon disperse.

As a result of the impeded access to the facility, approximately 77 technicians on the 7 and 7:30 a.m. shifts were unable to access the facility or company vehicles in the adjacent parking lot. This further resulted in a half hour or a 1-hour delay (depending on the shift) before technicians' could leave the facility in order to make scheduled appointments. The disruption caused a ripple effect of delayed or missed appointments throughout the day.

Cabrera, Ali, Anderson, and Tsavaris were not scheduled to work at the time, but decided to attend the event. All were aware that the Union called a "safety meeting." Anderson arrived early after driving 55 miles from his home to Paidge Avenue, parked and took a nap. Ali also drove his vehicle from Suffolk County and even picked up a coworker to attend the meeting. Diana Cabrera learned about the event on social media and, although she usually commuted to work by train or taxi, she was given a ride to the event by a coworker.[12]

The gathering dispersed at approximately 8 a.m., enabling technicians on the 7 and 7:30 a.m. shifts to report to work and begin their shifts.

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[9] GC Exh. 23A-B.

[10] Referring to the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.* 420 U.S. 251 (1975) affirming employees' rights to union representation at investigatory interviews.

[11] It is undisputed that Paidge Street was completely blocked off and a back-alley exit, which Corey used to return into the facility, was not previously used as an entrance by employees arriving for work or while working. (Tr. 229, 235–240, 248–249, 265–273, 384; GC Exh. 19–20, 23, 29; R. Exh. 6–7, 9–10.)

[12] The four employees admitted to being a part of the group that gathered in the middle of Paidge Avenue. (R. Exhs. 3–4.). As previously noted, Tsavaris and Cabrera testified that the Union called a safety meeting for the morning of April 2 in front of the facility, while Anderson and Ali asserted that they inadvertently stumbled onto the scene. Anderson's testimony that he drove there on his day off in order to file a grievance over his suspension was not credible. It was preposterous to believe that he drove 55 miles from home, parked his vehicle, took a nap and suddenly woke up to realize that he was blocked in by other vehicles. After attending the event, he left without making any attempt to file his grievance. (Tr. 121, 129–130, 135–142.) Ali, who lives about 40 miles from the facility, testified that he planned to drive into Manhattan to pick up mail, but decided to give a coworker a ride to work, then parked and exited his vehicle because he was curious. That explanation was also absurd. (Tr. 143, 146, 156–162.)

F. The District Court Action

In April 2014, the Company also sought injunctive relief in the United States District Court for the Eastern District of New York pursuant to Section 301 of the Labor Management Relations Act. The suit alleged the Union's violation of the no-strike clause in the contract in September 2013, March and April 2, 2014. After a 3-day hearing, Judge Jack Weinstein found that two of the incidents described in the complaint constituted a strike in violation of the no-strike clause:

> That was not a safety meeting . . . They blocked ingress and egress to that plant. There was a substantial delay in starting operations that day. I'm holding it was a strike. I don't want to get involved in any euphemisms.

Nevertheless, Judge Weinstein dismissed the petition on May 5, on the ground that the disputes involved were subject to arbitration, were in the process of being arbitrated and there was no evidence or likelihood of further violations of the no-strike clauses.

G. Arbitration Brought By The Company

On April 17, the Company initiated an arbitration proceeding against the Union seeking damages and other relief for the events on April 2. After three sessions, Arbitrator Daniel Brent found:

> That the convocation of this "safety meeting" was a pretext to communicate to the Company the Union's dissatisfaction about requiring Foremen to carry tools is not simply a justifiable conclusion; it is the only reasonable conclusion. . . .
>
> Thus, by creating a sham safety meeting that not only impeded the timely arrival of bargaining unit employees for their shifts, but also involved many employees until well after the scheduled commencement of their shift hours, and to the extent that customers were deprived of their coveted early morning appointments and other customers were inconvenienced by unnecessary delay in keeping scheduled service appointments throughout the day on April 2, 2014, the Union was directly and inextricably culpable . . .

On November 30, 2015, Arbitrator Brent issued a final award and awarded the Company damages in the amount of $19,297.96.

H. The Investigatory Interviews

After the April 2d strike, the Company launched an investigation to determine the identities of employees involved in the blockade. Employees identified through surveillance video as having attended the work stoppage were summoned to interviews in mid-April. Using a standardized questionnaire, Concetta Ciliberti, Mary Maldonoado, and other human resources department managers and supervisors asked each employee nearly two dozen questions.[13] They started with preliminary questions about tenure with the Company, assigned schedules and to

[13] R. Exh. 26–31.

whom they reported. The employees were also asked whether they were part of the group of employees who gathered outside the Paidge Avenue facility on April 2, how they got to work, whether they parked, if they arrived in a company vehicle, and what time they arrived. If the employee denied being present, he/she was shown photographs or the video indicating otherwise.

After establishing that the employee was present at the gathering, he or she was told, "It appears that Derek Jordan was present as well." The employee was then asked "who told" the employee about the gathering, "when" the employee received "notification of the gathering," how the "event" was "communicated" to the employee, and what the employee was "told about the reason for the protest." Any employees professing ignorance about the gathering and claiming not to be involved were asked why they remained outside and if they attempted to contact a manager or otherwise attempt to enter the facility.

Employees were then asked questions about the CBA and if they were "familiar with the section that prohibits cessation or stoppage of work." Reading from the script, company managers and supervisors recited that provision followed by standard comments conveying the ramifications of his/her actions on April 2:

> There shall be no cessation or stoppage of work, service or employment, on the part of, or at the insistence of either party, during the term of this Agreement.
>
> You understand that this rally stopped the work of the SNYC Area for over one hour prohibiting us from meeting our service calendar. As a result of this violation of the law and CBA and the inability to maintain our business. Do you understand that this action subjects you to discipline, including possible termination?
>
> (If the employee asks what happens next)
> We are gathering facts and you should return to work. To be clear, you are prohibited from engaging in any work slowdown or any other action which impacts on workflow. Any attempts to do so will lead to further discipline, including the possibility of immediate termination.
> If you have anything else you want to share w/me please call me or send me an email by tomorrow.

The four discriminatees, as well anyone else who was not scheduled to work on April 2, were also asked the following form questions:

> Why did you come to work? Did anyone in management direct you to come to work?
> [For previously suspended employees] Why did you come to work that day?
> You understand that a suspension means that you are not to come to work?
> You understand that you were in violation of your suspension by coming to work on April 2? Who directed you to come to work?

Cabrera told company investigators that she drove to the facility merely to drop someone off.[14] Ali also professed ignorance about the event, insisting he only drove to the facility in order

[14] Cabrera testified differently at the hearing, explaining that she got a ride to the facility with a

to drop someone off while on his way into Manhattan. He also told them that after venturing to the gathering, he learned that the gathering was described as a work safety meeting.[15] Anderson conceded that he was present at the site, but gave no explanation as to why he was there.[16] Tsavaris stated that he "just happened to be in the neighborhood" for "personal" reasons.[17]

I. The Suspensions

On May 22, 2014, the Company issued 2-week suspensions to seven employees determined to be the most culpable for the strike, either because they had no reason to be present other than to participate in the job action or because they engaged in particularly egregious conduct.[18] Approximately 34 employees, all of whom were scheduled to work during the work stoppage, received final written warnings. However, the Company overlooked the roles played by the facility's two shop stewards, including Papale, who was among those suspended on April 1 and not scheduled to work on April 2.[19]

Byron Yu was on the schedule at the time of the strike and played an active role by parking his vehicle in the middle of the street. Joseph McGovern, had called out sick earlier that day. David Lopez was assigned to another company facility and was scheduled to work later that day. The remaining four employees—Ali, Cabrera, Anderson, and Tsavaris—were not scheduled to work that day. The corrective action forms cited four grounds: violation of rules, safety violation, misconduct and "other." Their notices of discipline were virtually identical, with minor differences in the next to last paragraph of each:

> Attached is a disciplinary notice that you are being issued a final written warning and being suspended for two weeks effective May 22, 2014 for your role in the April 2 work stoppage in violation of the collective bargaining agreement.
>
> On the day of the illegal strike you were not scheduled to work, but appeared at Paidge Avenue to instigate and participate in the illegal work stoppage. You showed a complete disregard for your responsibilities to the Company and our customers, intentionally impeding service to our customers in violation of the no strike provision in the collective bargaining agreement.
>
> Your conduct justifies immediate termination. However, because we believe you were misled by the Union both about engaging in this conduct and about the consequences of your actions, we are going to give you this last chance. Your participation in any further

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coworker after learning of the "safety meeting" on social media. (Tr. 165.) Given her shifting explanations, I credit Maldonado's denial that she told Cabrera it would constitute insubordination for her to fail to respond. (GC Exh. 15; Tr. 290–291, 303–304, 308–309.)

[15] Ali's explanation to investigators was consistent with his testimony. (GC Exh. 14; Tr. 143, 146.)

[16] Anderson's statements to Maldonado contradicted the video evidence and his hearing testimony. (Tr. 285–287; R. Exh. 14; GC Exh. 16.)

[17] Contrary to his vague explanation to company investigators, Tsavaris conceded at hearing that he was present on Paidge Avenue that morning at Papale's instruction. (GC Exh. 17; Tr. 189–192, 195–196.)

[18] The disciplinary decisions were made by Ciliberti, Cory, and Regional Vice President of Operations John Quigley. (Tr. 113–120.)

[19] GC Exh. 4–7, 28.

work stoppages or other activities to impede the Company's business in violation of the collective bargaining agreement will lead to your immediate termination.

You should understand that your blind adherence to the Union's unlawful directives not only put you in danger of losing your job, but reflects very badly on you.

The Company and our customers expect more of you.[20]

J. Regional Director Revokes Dismissal of Union's Charge

On January 5, 2015, the Regional Director for Region 2 dismissed the instant charge on the ground that the April 2nd strike, spurred by the suspension of five foremen and the alleged violation of their *Weingarten* rights, violated the no-strike clause of the CBA and, thus, the Act. Additionally, she opined that the alleged unfair labor practices precipitating the April 2nd work stoppage were not sufficiently serious as to justify overriding the no-strike clause and that the suspensions flowed from employee misconduct during the unprotected strike. However, after Judge Fish issued the aforementioned decision on April 28, 2015, dismissing the complaint alleging unfair labor practices by the Union during the April 2 strike, the Regional Director revoked the dismissal of the instant charge on May 21, 2015.

K. The Board Denies The Company's Motion For Summary Judgment

On February 8, 2016, the Company moved for summary judgment dismissing the complaint allegation that it violated Section 8(a)(3) and (1) of the Act when it suspended Diane Cabrera for engaging in serious misconduct by participating in "a job action led by the Charging Party." The motion alleged that the "job action" upon which the complaint is premised constituted a "complete blockade" and disruption of Company's operations for over an hour and, thus, did not constitute protected activity under Section 7 of the Act. The motion was amended by the Regional Director in order to add the three additional employees who were also suspended – Azeam Ali, Andersen, and Tsavaris.

The General Counsel opposed the motion on the ground that there were genuine factual issues as to whether the four suspended employees lost the protection of the Act by their conduct during the strike activity. On April 8, 2016, the Board denied the Company's Motion for Summary Judgment on the ground that it failed to demonstrate the absence of issues of fact.

LEGAL ANALYSIS

I. The Suspensions

The General Counsel and Charging Party allege that the 2-week suspensions issued to Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris constituted unfair labor practices under Section 8(a)(3) and)(1) of the Act. The Company insists that the job action was actually

[20] The next to last paragraph in Ali's notice added "on you as a foreman" at the end of the sentence, while the notices issued to Anderson and Tsavaris added "on a foreman with your tenure with the Company." (GC Exhs. 4–7.)

an unlawful mass picket and, thus, the discriminatees engaged in misconduct by being at the event. The Company further contends that such misconduct rendered their activity unprotected.

NLRB v. Burnup & Sims, 379 U.S. 21 (1964), provides the applicable legal standard in cases involving employer discipline of employees who engage in misconduct during protected activities. Under the *Burnup & Sims* test, discipline is unlawful "if it is shown that the employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the [discipline] was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." Id. at 23.[21]

As orchestrated by the Union, several union officials and company employees halted company operations at 6:33 a.m. on April 2 by positioning seven vehicles in the street in front of the facility. The Union announced the event as a safety meeting and Jordan speak to employees about their *Weingarten* rights and the need to be careful in the field due to the unavailability of suspended foremen. However, the blockade orchestrated by the Union clearly amounted to a work stoppage or strike that lasted nearly 90 minutes and service appointments by technicians were delayed by either a half hour or a full hour. The four discriminatees were part of the group of employees who gathered in front of the Company's facility after the blockade was in place. All four went there at the behest of the Union.

A. *The No-Strike Clause*

Attendance by the four discriminatees at a Union event, including a work stoppage, discussing and/or protesting the Company's discipline of foremen and alleged violation of some of their *Weingarten* rights clearly constituted protected concerted activity. See *Mushroom Transportation Co. v. NLRB,* 330 F.2d 683, 685 (3d Cir. 1964) (activity relating to group action in the interest of the employees). However, that conduct lost its protection if it violated an extant no-strike prohibition incorporated into the terms and conditions of their employment. That, in turn, requires an initial determination as to whether the no-strike clause in the expired CBA still applied to unit members as of April 2.

The Board's decision in*, IBEW Local 3 (Time Warner Cable)* serves as the law of the case on the issue of whether there was an agreement between the parties regarding the expired CBA by virtue of the MOU entered into by the parties: there was no meeting of the minds as to significant portions of the agreement (the inclusion of local Riders) and thus, the parties did not agree to all of the material terms of a successor CBA.[22] See, e.g., *Great Lakes Chemical Corp.*,

[21] The Company's reliance on *Wright Line*, 251 NLR.B 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), is misplaced. It would have been appropriate if the Company had also disciplined the discriminatees for reasons unrelated to the allegedly protected activity, which is not the case. *Wright Line*, 251 NLRB at 20–21); *Transportation Management Corp*., 462 U.S. at 401–402 ("dual motive" analysis applicable where the protected conduct is shown to be a motivating factor in the discipline, in which case the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct").

[22] The Company's reliance on district court litigation and arbitration between the Company and the Union containing conclusions to the contrary is unavailing. "The Board adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully." *Field*

300 NLRB 1024, 1025 fn. 3 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992), and cases cited therein (generally, a finding necessary to support the judgment in a prior proceeding bars relitigation on that issue in a subsequent proceeding involving the same parties.")

It is the MOU and not the inability to agree to a successor CBA, which is dispositive with respect to the applicability of the no-strike clause to the events of April 2. The no-strike clause was among the numerous provisions of the expired CBA that were to carry over to the successor CBA but were not mentioned in the MOU. Its incorporation by reference in the MOU is evidenced by the introduction: '[T]he changes summarized below were agreed upon *relative to the [CBA] which will expire on March 31, 2013* and that the full text of the applicable changes will be incorporated in a new [CBA] which shall become effective upon ratification by the Union membership, scheduled for April 4, 2013." (emphasis supplied) The only reasonable interpretation of that preamble is that the changes mentioned into the MOU were being added to the language of the expired CBA along with those provisions not mentioned.

It has long been established that an employer violates Section 8(a)(5) when it unilaterally changes employees' wages, hours, and other terms and conditions of employment without providing their bargaining representative prior notice and meaningful opportunity to bargain about the changes. *NLRB v. Katz,* 369 U.S. 736, 742-743 (1962). The *Katz* rule, initially applied to newly certified unions, also extends to situations where the parties' agreement has expired and negotiations continue over a successor contract. In such instances, with certain exceptions, the parties are required to continue in effect terms and conditions of employment that are mandatory subjects of bargaining. *Litton Financial Printing Division v. NLRB,* 501 U.S. 190, 198 (1991).

In *Litton,* the court held that no-strike clauses, arbitration provisions and management rights clauses were mandatory subjects of bargaining but did not survive expiration of the contract. The court distinguished such provisions from other terms and conditions that survived because they represented the waiver of statutory rights that employees would otherwise enjoy in the interest of achieving an agreement. Id. at 199.

The parties bargained over the inclusion of Riders in a successor CBA. In the meantime, they continued to adhere to the *status quo ante*, with the exception of the Company's prompt implementation of the wage and benefits provisions of the MOU. This served as the Company's *quid pro quo* and evidence of the parties intent to continue applying certain terms and conditions of the expired CBA, such as the no-strike clause. See *Crimptex, Inc.,* 211 NLRB 855, 858 (1974) (evidence consistent with parties' intention to be bound until the final contract was executed); *Granite Construction Co.,* 330 NLRB 205, 208 (1999) (affirmative nod evidenced an oral agreement to extend the contract until the next bargaining session).

Bridge Associates, 306 NLRB 322, 322 (1992), enfd. sub nom. *Service Employees Local 32B-32J v. NLRB*, 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993). As the Board noted in *Teamsters Local 769, successor to Teamsters Local 390*, 355 NLRB 197, 200 (2010), this view is consistent with the "well established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests." (quoting *Herman v. South Carolina National Bank*, 140 F.3d 1413, 1425 (11th Cir. 1998).

The Board recently referenced the *Litton* principles in *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at 2 (2015). In that case, the Board overruled a contrary earlier decision in *Bethlehem Steel,* 136 NLRB 1500 (1962) and its progeny, holding that an employer's obligation to check off union dues constituted a mandatory subject of bargaining and, thus, survived contract expiration. Describing its inextricable link to wages and benefits, the Board distinguished dues checks from no-strike clauses, arbitration and provisions and management rights, which do not survive the contract. Id. at 3.

Litton and *Lincoln Lutheran* are distinguishable. Both cases involved the expiration of CBAs and there was an absence of evidence of subsequent intent by the parties to continue following the contractual provisions at issue. In the instant case, however, the intention of the parties was reflected in the MOU, which incorporated certain provisions from the expired CBA, including the no-strike clause. The MOU constituted a clear continuation of the waiver of employees' rights set forth in the expired CBA. *See Provena Hosps., d/b/a Provena St. Joseph Med. Ctr. & Illinois Nurses Ass'n*, 350 NLRB 808, 812 (2007) (finding that the waiver of a statutory right has to be explicit as well as clear and unmistakable).

Therefore, the no-strike clause, which remained in effect on April 2, prohibited the four discriminatees from the "cessation or stoppage of work, service or employment on April 2. Contrary to the Company's assertion, however, the four discriminatees did not violate the terms of the no-strike clause since they were in a nonworking status at the time. As such, they could not be deemed to have ceased or stopped working during the pendency of the strike.

B. The Conduct of The Discriminatees During the Strike

Even in the absence of an applicable no-strike clause, the activities of the four discriminatees would negate otherwise protected conduct if the Company had a reasonable belief that the employees were engaged in misconduct and the employees did, in fact, engage in misconduct. *Medite of New Mexico, Inc. v. NLRB,* 72 F.3d 780, 790 (10th Cir. 1995) (employer's refusal to reinstate employees justified based on "honest belief" that they engaged in misconduct during strike); *Machinists Local 1150* (*Cory Corp.*), 84 NLRB. 972, 975–976 fn. 9 (1949).

The evidence reveals that the four discriminatees went to the gathering on Paidge Street for a union meeting relating to working conditions, disciplinary actions, grievances and employees' *Weingarten* rights. Over approximately 2 weeks following the April 2 event, company managers and supervisors reviewed security video revealing that the blockade of its operations was fully in place by 6:33 a.m. As a result, prior to calling in the four discriminatees for their disciplinary/investigatory interviews, company officials knew that they were present during the strike, but did not cause the vehicular blockade of company operations. The blockade was implemented by union officials and other employees, and was already in place by the time the four discriminatees congregated in the middle of Paidge Avenue. Moreover, there is no credible evidence that any of the four discriminatees knew before arriving for the event that it would be venued in between vehicles parked in the middle of Paidge Avenue in a manner that would bring company operations to a halt.

Under the circumstances, the relatively passive participation of the four discriminatees at the strike location did not constitute misconduct. See *Abilities & Goodwill*, 241 NLRB 27, 31

(1979) (employer unlawfully discharged striking employees for passive participation in strike); *Bowman Transportation Co.*, 112 NLRB 387, 388 (1955) (insufficient evidence of disciplined employee's active participation in strike). Simply participating in a picket is not grounds for discipline because it would undo the active vs. passive test long applied by the Board. See *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 738 F.2d 1404, 1408 (4th Cir. 1984) (abusive behavior does not amount to serious strike misconduct unless it reasonably tends to coerce or intimidate coworkers); *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984) (quoting *NLRB. v. W.C. McQuaide, Inc.,* 552 F.2d 519, 528 (3d Cir. 1977) (misconduct has to reasonably coerce or intimidate employees from exercising their rights); Cf. *Big Horn Coal Co.*, 309 NLRB 255, 259 (1992) (picketing employees engaged in misconduct by actively interfering with the right of nonstriking employees to continue working).

The cases cited by the Company are distinguishable. In *Detroit Newspapers*, 342 NLRB 223 (2004), several disciplined employees actively intimidated and violently assaulted coworkers. Id. at 233–234. However, in the case of one employee disciplined for blocking the view of a delivery truck that was backing out of the facility, the Board concluded that the employer did not have a good faith belief that the employee engaged in misconduct. Id. at 231 (surveillance video showed that the employee was not an active participant in blocking the truck driver's view).

In *Kohler*, 128 NLRB 1062 (1960), employees participated in a strike that lasted months and in which the participants were actively engaged in the picket lines that blocked access to the plant. In that case, disciplined employees positioned their bodies in order to block non-striking employees from entering the plant. Id. at 1180. In contrast, the Company knew from reviewing security video that the four discriminatees simply stood in the crowd and had no involvement in constructing the vehicular blockade of the Company's facility and operations. Under the circumstances, the Company unlawfully suspended Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris in violation of Section 8(a)(3) and (1) of the Act.

II. The Interrogations

The complaint alleges that the Company unlawfully interrogated employees regarding their "union activities and sympathies of other employees" in the April 2 strike. The Company contends that its questioning of employees was lawful because it related to employee conduct during unprotected mass picketing.

Section 8(a)(1) of the Act prohibits employers from questioning employees in a manner that tends to restrain, coerce or interfere with protected concerted activity. *Rossmore House*, 269 NLRB 1176, 1177 (1984). In determining whether questioning is coercive, we must examine the "totality of the circumstances." Id. at 1178. Factors in determining whether an interrogation is coercive include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply. *Bourne v. NLRB.*, 332 F.2d 47, 48 (2d Cir. 1964). The *Bourne* factors provide a framework to use when assessing the lawfulness of employee interrogation. *800 River Rd. Operating Co. LLC v. NLRB*, 784 F.3d 902, 913 (3d Cir. 2015); see also *Timsco Inc. v. NLRB*, 819 F.2d 1173, 1179 (D.C. Cir. 1987) (questioning of employees about their participation in union election by

company president, who previously had little interaction with employees and espoused anti-union views, viewed as coercive).

Employees were instructed to meet with company managers, supervisors, and human resource staff in a conference room, where the company officials proceeded to rattle off questions from a prepared script. Certain questions asked of employees were reasonably related to a legitimate investigation seeking to identify employee misconduct, i.e., the perpetrators of the vehicular blockade. These included questions seeking to confirm the employee's presence in front of the facility on April 2, their arrival time, how they got there, whether they drove a company vehicle, and where they parked.

Other questions, however, went well beyond potential employee misconduct or involvement in the vehicular blockade by seeking to elicit employee knowledge about union activities. Employees were asked who told them about the gathering, how and when they learned about the gathering, and what they were told about the reason for the protest. After extracting information about the event, company officials tested employees on their knowledge of the CBA, asking whether they had reviewed it and were familiar with the no-strike clause.

The totality of the circumstances established that the questions relating to employee knowledge about the organization of the April 2 event were coercive. The questions were asked in a formal setting by human resource managers, supervisors, and staff in the presence of shop stewards. Having already established that the employee was present at the gathering on April 2, these questions revealed the possibility of potential or further discipline based on the employee's answers to the questions. See *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 710–711 (2005) (motivation for the questioning was to identify employees who were union sympathizers).

Since everyone in the interview room knew about the union-initiated activity that transpired on April 2, questions relating to communications and planning for the event reasonably conveyed the sense that the Company sought to unearth the employee's union activities, as well as the names of other employees involved with or sympathetic to the Union. A similar coercive effect resulted from the Company's inquiry as to why the four discriminatees, who were not scheduled to work that morning, were at the event. See *Metro-W. Ambulance Service,* , 360 NLRB No. 124, slip op. at 65 (2014) (employer policy preventing employees from being at work when not scheduled to work discouraged protected activities in violation of Sec. 8(a)(1).

Moreover, questions posed to employees about their knowledge of the CBA and, in particular, the no-strike clause, were unrelated to the determination of whether an employee participated in the blockade. Having apprised employees that they were being investigated and questioned in connection with their activities on April 2, inquiries about their familiarity with the CBA and the no-strike clause reasonably tended to chill employees' future union activities.

Under the circumstances, the Company interrogation of employees regarding the events of April 2 violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Time Warner Cable New York City, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Union No. 3 International Brotherhood of Electrical Workers AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by suspending employees Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris on October 30, 2001, because they engaged in protected union activity by participating in a work stoppage on April 2, 2014.

4. Respondent coercively interrogated employees regarding the events of April 2, 2014, in violation of Section 8(a)(1) of the Act.

5. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily suspended employees, must make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Time Warner Cable New York City, LLC, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

Suspending or otherwise discriminating against employees because they engaged in protected union activity.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Coercively interrogating any employee about union support or union activities.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

Make Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspensions of Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris and, within 3 days thereafter notify the employees in writing that this has been done and that the suspensions will not be used against them in any way.

Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

Within 14 days after service by the Region, post at its facility Brooklyn, New York, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2, 2014.

Sign and return to the Regional Director sufficient copies of the notice for physical and/or electronic posting by Time Warner Cable New York City, LLC, if willing, at all places or in the same manner as notices to employees are customarily posted.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 14, 2016

Michael A. Rosas
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT suspend or otherwise discriminate against any of you for supporting Local Union No. 3 International Brotherhood of Electrical Workers AFL–CIO or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Diana Cabrera, Azeam Ali, Ralf Anderson and Frank Tsavaris whole for any loss of earnings and other benefits resulting from their suspension, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspensions of Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris, and

WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions will not be used against them in any way.

TIME WARNER CABLE NEW YORK CITY, LLC
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Room 3614, New York, NY 10278-0104
(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-126860 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.